

CAUSE NO. 2019-06610

JANE DOE

VS.

**BRENNANS OF HOUSTON, INC. d/b/a
BRENNANS OF HOUSTON**

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

80TH JUDICIAL DISTRICT

**DEFENDANT BRENNANS OF HOUSTON, INC.'S
FIRST AMENDED RULE 91a MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON** (“**BRENNANS**”), and files this its First Amended Rule 91a Motion to Dismiss as to certain of Plaintiff, Jane Doe’s, claims and/or causes of action, and would respectfully show unto this Honorable Court as follows:

I.

Plaintiff’s Current Allegations and Challenged Causes of Action

Plaintiff, Jane Doe, filed her lawsuit against **BRENNANS** on January 28, 2019 seeking recovery of damages in excess of \$20,000,000 premised upon causes of action and/or theories of recovery, including: 1) sexual assault and battery; 2) aiding and abetting sexual assault; 3) Intentional Infliction of Emotional Distress; 4) Premises Liability; 5) Negligence; 6) Gross Negligence; 7) *Respondeat Superior*/Agency; and, 8) statutory liability for alleged violations of Chapter 2 of the Texas Alcoholic Beverage Code (the “Dram Shop” Act). **BRENNANS** filed its original Rule 91a Motion to Dismiss on March 29, 2019, within sixty (60) days after the first pleading containing the challenged causes of action was served upon **BRENNANS**. *See*, TEX. R. Civ. P. 91a.3(a). Pursuant to Local Rule 3.3.3, **BRENNANS**’ original Rule 91a Motion was set

to be heard on the Court's April 22, 2019 submission docket. On April 3, 2019 – more than three days before the scheduled submission hearing on **BRENNANS'** original Rule 91a Motion -- Plaintiff filed her Second Amended Petition amending the causes of action challenged by **BRENNANS'** original Rule 91a Motion. In accordance with Rule 91a.5(b), before the date of the hearing on **BRENNANS'** original Rule 91a Motion, **BRENNANS** now files this its First Amended Rule 91a Motion to Dismiss.

Plaintiff's Allegations - Plaintiff alleges that on October 19, 2015, she was drugged by a bartender working for **BRENNANS** while Plaintiff was drinking and dining at **BRENNANS**; and Plaintiff further asserts that she was later repeatedly sexually assaulted at her home by the same bartender. Plaintiff alleges that Defendant, Christopher Lockhart ("Lockhart"), aided and abetted the bartender's alleged sexual assault of Plaintiff, and that Lockhart also assaulted Plaintiff by "...intentionally or knowingly plac[ing] [Plaintiff] in reasonable apprehension of imminent harmful or offensive contact" with the "present, apparent ability to cause the harmful or offensive contact". See, *Plaintiff's Second Amended Petition*, at pp. 10 and 11. Plaintiff also alleges that she was "over-served" alcohol by the same bartender on the "night in question", and that she became "visibly incapacitated", and was "obviously impaired" and "severely impaired" after being over-served with alcohol.

Challenged Claims – In its original Rule 91a Motion to Dismiss, **BRENNANS** moved for dismissal with prejudice as to the following of Plaintiff's claims and/or causes of action against it on the grounds that such claims and/or causes of action have no basis in law and/or no basis in fact:

- 1) sexual assault and battery;

- 2) aiding and abetting sexual assault;
- 3) Intentional Infliction of Emotional Distress; and,
- 4) Negligence and gross negligence claims premised upon vicarious liability theories such as *respondeat superior*, an employer's right of control, and/or agency.

In her Second Amended Petition, Plaintiff deleted Plaintiff's previously pled claim against **BRENNANS** for Intentional Infliction of Emotional Distress, as well as her claims against **BRENNANS** for "Sexual Assault and Battery" and for "Aiding and Abetting Sexual Assault and Battery". In her Second Amended Petition, Plaintiff amended her claims premised upon vicarious liability, including the inclusion of the express disclaimer, "To be clear, Plaintiff does not allege that Kerrigan or Lockhart were acting in the course and scope of their employment with **BRENNANS** when Kerrigan raped Plaintiff, with Lockhart's aid and assistance". *See, Plaintiff's Second Amended Petition*, at p. 7. Plaintiff amended her cause of action with respect to the alleged statutory violations of the Dram Shop Act by **BRENNANS**, adding a Section denominated as "Cause of Action 1: Dram Shop (Brennans)", asserting that **BRENNANS** sold or provided alcoholic beverages to a person who was obviously intoxicated to the extent that they presented a clear danger to themselves and others, and that **BRENNANS'** conduct in over-serving alcohol to the "obviously intoxicated" Plaintiff "contributed to Plaintiff's state of intoxication and was a proximate cause of the injuries sustained by Plaintiff." *See, Plaintiff's Second Amended Petition*, at pp. 6-7.

Plaintiff's non-suit, or voluntary dismissal by means of Plaintiff's Second Amended Petition, of her causes of action against **BRENNANS** for: 1) Intentional Infliction of Emotional Distress; 2) "Sexual Assault and Battery"; and, 3) "Aiding and Abetting Sexual Assault and Battery" moots **BRENNANS'** Rule 91a Motion to Dismiss with respect to those withdrawn causes

of action against **BRENNANS**. Likewise, the amendments made in Plaintiff's Second Amended Petition expressly negating any allegation by Plaintiff that the bartender or Lockhart were acting in the course and scope of their employment with **BRENNANS** when the bartender allegedly raped Plaintiff, with Lockhart's aid and assistance, and deleting the prior allegation that the bartender "was acting in the course and scope of his employment at **BRENNANS** when he drugged Plaintiff ..." moots **BRENNANS'** original Rule 91a Motion to Dismiss with respect to Plaintiff's claims of vicarious liability against **BRENNANS** premised upon the intentional torts allegedly committed by its employees. Accordingly, **BRENNANS'** First Amended Rule 91a Motion to Dismiss does not address or seek a ruling on the three causes of action withdrawn by Plaintiff's Second Amended Petition or with respect to Plaintiff's prior claims and causes of action against **BRENNANS** premised upon vicarious liability under the doctrine of *respondeat superior* as to the intentional torts allegedly committed by one or more of **BRENNANS'** employees in purportedly drugging and sexually assaulting the Plaintiff.

Instead, **BRENNANS'** First Amended Rule 91a Motion to Dismiss challenges the following of Plaintiff's common law causes of action against **BRENNANS**:

- 1) Cause of Action 2: Negligence (Brennans);
- 2) Cause of Action 3: Negligence *Per Se* (Brennans);
- 3) Cause of Action 4: Premises Liability (Brennans); and,
- 4) Cause of Action 5: Gross Negligence (Brennans).

A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *See*, TEX. R. CIV. P. 91a.1. Here, with respect to the challenged causes of action, Plaintiff's common law causes of action are preempted by the exclusive remedy provision of the Dram Shop Act as

explained below. Since there are no remaining allegations that **BRENNANS** is vicariously liable for the intentional torts allegedly committed by one or more of **BRENNANS'** employees in purportedly drugging and sexually assaulting the Plaintiff, and as Plaintiff's common law claims against Brennan's premised upon Plaintiff being over-served with alcohol are precluded by the Dram Shop Act's exclusive statutory remedy, the common law claims asserted by Plaintiff against **BRENNANS** have no basis in law.

II. Argument and Authorities

In ruling on a Rule 91a motion, a court must decide “whether the pleadings, liberally construed, allege sufficient facts” that, if true, would “entitle the claimant to the relief sought.” *See, City of Dallas v. Sanchez*, 494 S.W.3d 722, 724-25 (Tex. 2016) (quot. omitted); *see also* TEX. R. CIV. P. 91a.1 (“allegations, taken as true” must “entitle the claimant to the relief sought”). In determining whether a cause of action should be dismissed under Rule 91a, the Court must consider only the pleadings, and any pleading exhibits permitted under Rule 59. TEX. R. CIV. P. 91a.6.

The Rule 91a pleading-sufficiency standard is similar to the federal courts' standard. *See Vasquez v. Legend Natural Gas III L.P.*, 492 S.W.3d 448, 452-456 (Tex. App. – San Antonio 2016, pet. denied), *citing Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As a result, Texas courts “find case law interpreting Rule 12(b)(6) instructive.” *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App. – Houston [14th Dist.] 2014, pet. den.); *see also Vasquez*, at 451 (*citing Wooley*). Under both the Rule 91a and the federal standard, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, at 678; *see also Vasquez*, at 451 (quoting same statement). As a result, while courts

must accept a plaintiff's "*factual* allegations as true, [courts] need not afford the same deference to [the] plaintiff's *legal* conclusions or *conclusory statements*." *Vasquez*, at 451 (emph. in orig.), *citing, among other cases, Twombly*, at 555.

"Negligence actions in Texas require a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *Nabors Drilling U.S.A. Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009) (quot. omitted). A gross-negligence claim does not exist without an underlying negligence claim. *See, e.g., Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App. – Houston [14th Dist.] 1994, writ den.) (lack of legal duty defeated both ordinary-negligence and gross-negligence claims). The insufficiency of Plaintiff's petition as to any element of Plaintiff's challenged causes of action requires dismissal of such cause of action. Plaintiff's petition does not allege sufficient facts to support the existence of a legal duty as to the challenged causes of action as to **BRENNANS**.

Exclusive Remedy Provision of Dram Shop Act Preempts Common Law Claims

In Plaintiff's Second Amended Petition, Plaintiff directly asserts that **BRENNANS** violated the Dram Shop Act by serving, selling, or providing alcoholic beverages to a person who was obviously intoxicated to the extent that they presented a clear danger to themselves and others, and that **BRENNANS'** conduct in over-serving alcohol to the "obviously intoxicated" Plaintiff "contributed to Plaintiff's state of intoxication and was a proximate cause of the injuries sustained by Plaintiff." *See, Plaintiff's Second Amended Petition*, at pp. 6-7. Given Plaintiff's factual assertions that she is a lawyer, a partner at the Houston office of a large international law firm, and has practiced law for more than twelve years, there can be no doubt that Plaintiff is more than eighteen (18) years of age.

Section 2.03 of the Texas Alcoholic Beverage Code (the "Dram Shop Act") provides as

follows:

EXCLUSIVITY OF STATUTORY REMEDY.

- (a) The liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated **is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.**
- (b) This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter.
- (c) **This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.**

See, TEX. ALCO. BEV. CODE §2.03 [Emphasis Added].

The Texas Supreme Court has definitively held that the foregoing “exclusive remedy” provision of the Dram Shop Act means just what it says. See, *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 687 (Tex. 2007) (*Read as written, in context, Section 2.03 simply means that the Dram Shop Act provides the exclusive remedy against an alcohol provider for damages caused by an intoxicated patron at least 18 years of age — i.e., common law remedies are no longer available.* (citing *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 412 (Tex.2000)). It matters not whether the injuries caused by the over-service of alcohol are to a third party or to the intoxicated patron – the exclusive remedy provision applies to both types of claims. See, *Id.*, at 691 [Emphasis Added] (*More specifically, the Dram Shop Act codifies the exclusive action against an alcohol provider for injuries or damages resulting from the intoxication of a patron. Id. § 2.02. The legislative intent to protect the public and provide a potential remedy against an alcohol provider does not equate to a guarantee of recovery against a provider by an injured party. The Act simply supplants in a single codified action all prior common law theories that previously could have been employed by the injured party (either a third party or the intoxicated*

*patron himself) against a provider. See id. § 2.03.). See also, Borneman v. Steak & Ale of Tex., Inc., 62 S.W.3d 898, 908 (Tex. App. – Fort Worth 2001, no pet.) (Additionally, as previously noted, the legislature expressly pronounced the Dram Shop Act to be the exclusive remedy against providers of alcohol to individuals age eighteen or older. Id. § 2.03. The Act still further provides that the statutory cause of action " is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages." Id. (emphasis added). **This language clearly expresses legislative intent to exclude all common-law rights and bar all claims except those specifically authorized by the statute.** (citing, *Smith v. Merritt*, 940 S.W.2d at 605, 608; *Southland Corp. v. Lewis*, 940 S.W.2d 83, 84 (Tex.1997) (**both stating that the Act's exclusive remedy provision clearly bars any common-law negligence or negligence per se causes of action**)).*

The common law causes of action precluded by the Dram Shop Act's exclusive remedy provision include a claim based upon a premises liability theory. *See, Parker v. 20801, Inc.*, 194 S.W.3d 556, 560-563 (Tex. App. – Houston [14th Dist.] 2006, *rev'd on other grounds*)(disagreeing with appellant's contention that he can simultaneously pursue both dram shop and premises liability causes of action, and holding in a case of first impression that a plain reading of Section 2.03 preempts a provider's common law duty as a premises owner.).

Plaintiff's claims for exemplary or punitive damages under a gross negligence theory of recovery are also precluded because exemplary and/or punitive damages are not recoverable for an alleged violation of the Dram Shop Act, which statutory cause of action is Plaintiff's exclusive remedy for claims based upon this Defendant's alleged over-service of alcohol to Plaintiff. *See, Borneman v. Steak & Ale of Tex., Inc.*, 62 S.W.3d 898, 908 (Tex. App. – Fort Worth 2001, no pet.).

Accordingly, after due notice and hearing, **BRENNANS'** First Amended Motion to Dismiss as to Plaintiff's common law claims and causes of action should be granted as the Dram

Shop Act's exclusive remedy provisions preempts and bars all such common law claims.

III. Claim for Attorney's Fees and Costs

Pursuant to Rule 91a, should **BRENNANS** prevail on its First Amended Motion to Dismiss as to the challenged common law claims and causes of action, **BRENNANS** would be entitled to recover its reasonable and necessary attorney's fees and costs incurred in connection with such Motion: "[T]he court must award the prevailing party on the motion all costs and reasonable and necessary attorney's fees incurred with respect to the challenged cause of action in the trial court." TEX. R. CIV. P. 91a.7; TEX. CIV. PRAC. & REM. CODE 30.021. The fees awarded should include **BRENNANS'** reasonable and necessary appellate attorney's fees, if Plaintiff appeals a ruling in favor of **BRENNANS**. *See, Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 187-88 (Tex. App. – Houston [14th Dist.] 2015, pet. denied). ("Rather the word "all" [as used in Rule 91a] entails just that — "all" fees — which would include appellate fees, because they are part of the fees incurred to ultimately prevail, if the ruling is appealed."). To the extent **BRENNANS** is the prevailing party on its First Amended Motion to Dismiss, **BRENNANS** reserves its right to submit evidence in support of the fees and costs incurred in preparing and arguing this First Amended Motion to Dismiss, through the date of the hearing and any appeal.

WHEREFORE, PREMISES CONSIDERED, Defendant, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON**, prays that the Court: 1) grant Defendant's First Amended Rule 91a Motion to Dismiss; 2) order the dismissal with prejudice of Plaintiff's claims and/or causes of action against this Defendant made the subject of Defendant's First Amended Rule 91a Motion to Dismiss; and, 3) award Defendant all reasonable and necessary attorney's fees and costs incurred in connection with Defendant's First Amended Motion to Dismiss. Defendant

further prays for such other and further relief, both special and general, at law and in equity, to which this Defendant may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Defendant Brennans of Houston, Inc.'s First Amended Rule 91a Motion to Dismiss* was served upon the following counsel of record in compliance with Rule 21a of the Texas Rules of Civil Procedure on this the 16th day of April, 2019, as follows:

VIA E-SERVICE

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